

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARILYN BOWMAN-BRITT</b>	:	DETERMINATION DTA NO. 818976
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Year 1995.	:	

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Petitioner, Marilyn Bowman-Britt, 197 East 56<sup>th</sup> Street, Brooklyn, New York 11203, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1995.

Pursuant to 20 NYCRR 3000.9(b), by a motion dated July 3, 2002, the Division of Taxation (“Division”), which appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel), moved for summary determination<sup>1</sup> on the grounds that there were no material issues of fact and the undisputed facts mandated a finding in the Division’s favor. Answering papers due by August 2, 2002 were never filed, and such due date commenced the 90-day period for issuance of this determination. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, hereby renders the following determination.

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<sup>1</sup> The Division designated its motion as one for summary determination. Nonetheless, in addition to the grounds noted above, the Division also contended that “the pleading fail[ed] to state a cause for relief.” Pursuant to 20 NYCRR 3000.9(a)(1)(vi), such grounds would be the basis for a motion to *dismiss*. Since the Division’s motion has been treated as one for summary determination, it was not necessary to address this alternative contention.

### ***ISSUE***

Whether the Division of Taxation properly disallowed petitioner's claim for refund of personal income taxes for the year 1995.

### ***FINDINGS OF FACT***

1. Petitioner failed to file a timely New York State income tax return for 1995. Rather, she filed a New York State and City income tax return for 1995 more than three years late on September 7, 1999. On her return, she reported New York adjusted gross income of \$53,322.00, with taxable income of \$40,933.00 after claiming an itemized deduction. On this taxable income, she calculated New York City income tax of \$1,594.00 and New York State income tax of \$2,680.00 for total 1995 New York State and City income tax of \$4,274.00. Since she had New York State and City income tax withheld in the total amount of \$4,929.00, petitioner claimed a refund of \$655.00 representing the amount overpaid.

2. The Division of Taxation ("Division") issued a Notice of Disallowance dated April 21, 2000 rejecting petitioner's refund claim for the following reason:

The Tax Law does not permit us to allow the refund or credit you claimed on your income tax return for the year(s) 1995. The deadline for filing for a refund or credit expired three years from the date the return was due.

There is no provision in Section 687 of the New York State Tax Law for waiving the three year statute of limitations as it applies to requests for refunds or credits.

3. In her petition, petitioner explained that "[d]uring the year, 1995, I did not have the clear presence of mind nor the concentration to fulfill my own business obligations." Petitioner, noted further that she was the "sole caretaker of both my parents," who have suffered serious illnesses and hospitalizations since 1993.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may be granted,

[I]f, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Here, petitioner did not respond to the Division's motion, and she is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942).

B. Pursuant to Tax Law § 687(i), "any income tax withheld from the taxpayer during any calendar year . . . shall be deemed to have been paid by [her] on the fifteenth day of the fourth month following the close of his taxable year . . . ." Consequently, the \$655.00 overwithheld from petitioner's wages during 1995 is properly deemed to have been paid by her on April 15, 1996 (*see, Matter of Walker*, Tax Appeals Tribunal, September 23, 1999; *see also Davison v. Commissioner*, 64 TCM 1517, *affd* 9 F3d 1538 [wherein the Tax Court interpreted the comparable Federal provision at IRC § 6513(b)(1) in a similar fashion]).

C. Pursuant to Tax Law § 687(a), a limitations period is imposed upon taxpayers who wish to claim a refund of an overpayment of income tax as follows:

Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return.

D. As noted in Finding of Fact "1", petitioner filed her 1995 New York income tax return on September 7, 1999. This return was properly treated by the Division as a claim for refund

(*cf.*, ***Matter of Miles***, Tax Appeals Tribunal, September 13, 1990). Since the Division received petitioner's 1995 tax return and her claim for refund, which was contained therein, on the same day, i.e., September 7, 1999, petitioner's claim for refund was therefore made "within three years from the time the return was filed." However, under Tax Law § 687(a), "the amount of the . . . refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim . . . ." Since the overwithheld tax of \$655.00 was not paid within the three years immediately preceding September 7, 1999, but rather was properly deemed paid on April 15, 1996, as noted in Conclusion of Law "B", petitioner's claim for refund must be denied.

E. The Tax Appeals Tribunal in ***Matter of Burkhardt*** (January 9, 1997) noted that New York's income tax refund procedures have been recognized as a "constitutionally sound scheme which . . . simultaneously [respected] the State's fisc [citation omitted]." Consequently, the limitations period of three years described above is, without any doubt, legally valid.

F. As a final note, there is no basis in the law to waive the limitations period based upon a taxpayer's lack of attention to her responsibilities due to personal illness or the illness of relatives. Even in the very extreme case where a senile taxpayer, who was 93 years old, mailed a check for \$7,000.00 instead of \$700.00 to the Internal Revenue Service, the United States Supreme Court, in reversing the federal Court of Appeals, recognized that there was no legal authority to waive the period of limitations for filing a refund claim (***United States v. Brockamp***, 519 US 347, 117 S Ct 849, 136 L Ed 2d 818, *rev'd* 67 F3d 260).

G. The motion for summary determination of the Division of Taxation is granted, the petition of Marilyn Bowman-Britt is denied and the Division's denial of petitioner's claim for refund is sustained.

DATED: Troy, New York  
October 17, 2002

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE